



that he had proven accidental injury and, further, that he had provided timely notice of accident.

Therefore, the issues for the Board's consideration are:

1. Whether the ALJ erred in finding that claimant suffered accidental injury arising out of and in the course of his employment, either for a specific traumatic incident on January 31, 2004, or a series of accidents through October 11, 2004.
2. Whether the ALJ erred in finding that claimant had provided timely notice of the above accidents.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds as follows:

Claimant worked for respondent as a locator. This required that claimant walk between five and eight miles a day<sup>3</sup> and that he locate underground utilities in order to ensure persons digging in the vicinity do not damage those utilities. Claimant testified that on January 31, 2004, while performing his duties, he lifted a hand hole, which caused him to suffer immediate low back pain. Claimant obtained treatment from his family physician, Ray M. Jones, D.O., of Wellsville, Kansas, on that date. However, there is no mention in Dr. Jones' January 31, 2004 progress note of any work-related connection to claimant's lumbar back pain. It is significant that claimant presented himself to Dr. Jones on November 15, 2003, immediately after the November 14, 2003 first date of accident. At that time, Dr. Jones was advised that claimant's back was injured and that claimant believed he pulled a muscle in the middle of his back "**at work yesterday**."<sup>4</sup>

Claimant continued working for respondent in his capacity as a locator through his last day worked on October 12, 2004. He sought no additional medical treatment from Dr. Jones until August 2004. However, on March 18, 2004, he presented himself at the Olathe Medical Center with mid back pain, which according to the records was caused by claimant twisting wrong. The note does refer to an incident which occurred approximately three months before, which does not coordinate with the November 14 date of accident or with the January 31 alleged date of accident, but does historically agree with the November 14 injury description. The medical records at that time indicated that claimant

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<sup>3</sup> See page 2 of the November 4, 2004 report of Robert T. Tenny, M.D. (P.H. Trans., Cl. Ex. 10.)

<sup>4</sup> P.H. Trans., Cl. Ex. 2.

needed to finish sheetrock over the next two to three days. Claimant, when asked at preliminary hearing, testified that he had not done any sheetrocking, that he “was going to help a guy do some sheetrocking and couldn’t.”<sup>5</sup>

Claimant presented himself to Dr. Jones on April 28, 2004, with back pain, which he described as having been caused at home. Claimant thought at that time he had suffered another pulled muscle. The date of accident was described as April 27, 2004. Claimant’s next examination with Dr. Jones was August 16, 2004.

Claimant went to a family reunion in South Dakota on July 2, 2004, and was off work from July 2 through July 7 for the family reunion and/or what was described as personal problems at home. Additional explanation was not provided in the record.

Claimant was off beginning August 6, 2004, in order to take his wife to the Mayo Clinic for medical treatment. Dr. Jones’ medical report of August 16, 2004, describes low back pain resulting from a long drive which occurred approximately one week before. This would coordinate with the trip to the Mayo Clinic. Work-related involvement with this low back pain is not mentioned in the report.

Claimant also went to the Olathe Medical Center on August 17, 2004, with a ten-day history of low back pain. Claimant returned to the Olathe Medical Center on August 22, 2004, again with low back pain, which claimant stated he had never experienced “like this before.”<sup>6</sup> The August 22 report also indicated that claimant underwent manipulation with Dr. Jones on or about August 12, 2004, which made claimant’s condition worse. Claimant obtained medical care on October 6, 2004, with an indication that his problems evolved after the ten-hour drive to Minnesota to the Mayo Clinic and the return two days later, which indicated that claimant was suffering severe pain during the last three hours of the trip.<sup>7</sup> The medical treatment up to this point was being turned in to Mutual of Omaha, claimant’s personal health insurance company.

Claimant returned to Walk-In Health Care of Olathe (a division of Olathe Medical Services, Inc.) on October 12, 2004, for additional treatment. The medical notes at that time indicate claimant’s condition was not work related.

Claimant contacted Dawn Baker, the human resource manager for respondent, on October 12, 2004. Ms. Baker did not testify in this matter, but her affidavit dated

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<sup>5</sup> P.H. Trans. at 52.

<sup>6</sup> P.H. Trans., Resp. Ex. D (Report from Olathe Medical Center dated Aug. 22, 2004).

<sup>7</sup> P.H. Trans. at 63.

February 12, 2005,<sup>8</sup> was admitted for consideration. In the affidavit, Ms. Baker discussed her phone calls with claimant, at which time claimant requested information about short-term disability and personal time off (PTO). Claimant was advised that he could not use PTO for a work-related injury but, if it was not work related, the PTO time was available. Claimant also advised Ms. Baker that he had advised his doctor he was not sure if his condition was work related, but that he had been in pain since the beginning of August. On October 13, 2004, Ms. Baker received an e-mail and voice mail message from claimant, inquiring about the PTO. On October 18, 2004, Ms. Baker received a telephone call from claimant requesting paperwork to file a workers compensation claim. At that time, claimant advised Ms. Baker that driving had made his problem worse and, therefore, it was a workers compensation claim.

Claimant, at the time of the preliminary hearing, testified that not only driving, but also the walking that he was obligated to do caused him additional ongoing problems with his back. Claimant testified he spoke to his supervisor, Nathan Boltz, about his problems. While Mr. Boltz acknowledged that claimant had discussions with him about back problems, they were never indicated to be related to claimant's work. Mr. Boltz was aware of the November 2003 injury to claimant's upper back, but was never made aware of any low back problems or leg pain until after the August 2004 trip to the Mayo Clinic. At that time, claimant advised Mr. Boltz the condition was not work related.

Mr. Boltz contradicted claimant's testimony that he would be obligated to lift 60 to 80 pounds on a regular basis. Mr. Boltz testified that the ped covers weigh from 2 to 3 pounds and that the most claimant would be required to lift beyond that would be in the 25- to 30-pound weight category. Claimant had testified that, in his job, he had to lift hand holes and ped covers, and also manhole covers. Mr. Boltz testified that there would be no reason for claimant to ever lift a manhole cover on that job. Mr. Boltz also testified that he had performed the locator job for six years and was well aware of the requirements of the job. He did acknowledge that walking was significant, but disputed that claimant had to walk from five to eight miles per day. He additionally acknowledged that in certain instances the walking over rough terrain could be difficult. Mr. Boltz prepared a handwritten statement, which was marked as Respondent's Exhibit G to preliminary hearing, discussing both the August 2004 conversation with claimant and an October 11, 2004 conversation with claimant about his back problems. On neither occasion did claimant advise that his problems were related to his employment. Claimant did, however, discuss the fact that his back hurt at the end of the long trip to the Mayo Clinic.

Claimant contacted respondent and, on October 20, 2004, caused an Employee Statement of Accident to be completed in the presence of Mr. Boltz. In that statement, which is marked as Respondent's Exhibit F to the preliminary hearing, the date of accident

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<sup>8</sup> P.H. Trans., Resp. Ex. A.

was listed as November 14, 2003, when claimant twisted his back while lifting a ped cover. There is no mention of a January 31, 2004 date of accident or a series of accidents through claimant's last day worked in that accident report. The body part afflicted, however, does indicate that it is a lumbar disc with a herniated disc involved. The original accident report, prepared at the time of claimant's November 14, 2003 accident, indicates the pain in claimant's back between the shoulder blades occurred when claimant pulled a ped cover. This report form, marked as Respondent's Exhibit E, is also part of the record.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.<sup>9</sup> The Board cannot find based upon this record that claimant proved he suffered accidental injury on January 31, 2004. Medical records contemporaneous with that alleged date of accident make no mention of a work-related injury. Additionally, claimant sought medical treatment on numerous occasions between then and October 2004, when his employment with respondent ceased. At no time during this several-month period did claimant mention a traumatic incident in January 2004 or any problems associated with the daily walking involved in his job. There are numerous medical records in evidence which indicate several others causes of claimant's ongoing problems, including his travel and the possibility that claimant was involved in performing sheetrock work, although this was clearly disputed by claimant. In at least one instance, the cause is listed as stress.

While claimant argues that he was unaware of the law regarding microtraumas in Kansas, this does not explain his failure to mention a specific traumatic incident in January of 2004 to Dr. Jones when earlier, in November 2003, he had provided specific information to Dr. Jones about a similar incident.

The Board finds, based upon this record, that the Order of the ALJ should be reversed, as claimant has failed to prove that he suffered accidental injury either on January 31, 2004, or through a series of accidents ending on October 12, 2004, his last day worked with respondent.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated February 23, 2005, should be, and is hereby, reversed.

**IT IS SO ORDERED.**

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<sup>9</sup> K.S.A. 44-501 and K.S.A. 44-508(g).

Dated this \_\_\_\_ day of May 2005.

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**BOARD MEMBER**

c:     Derek R. Chappell, Attorney for Claimant  
       Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier  
       Robert H. Foerschler, Administrative Law Judge  
       Paula S. Greathouse, Workers Compensation Director